Supreme Court, U.S.
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No. 00-1045

IN THE
Supreme Court of the United States

TRW INC.,

Petitioner,

v.

ADELAIDE ANDREWS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE ASSOCIATED CREDIT BUREAUS, INC., TRANS UNION LLC, EQUIFAX CREDIT INFORMATION SERVICES, INC., AND EXPERIAN INFORMATION SOLUTIONS, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF INTEREST

The consumer credit reporting industry plays a vital role in the national economy by facilitating the granting of credit, insurance, and employment to consumers.[1] As Congress expressly stated over thirty years ago, the American banking system is "dependent upon fair and accurate credit reporting," and consumer credit reporting agencies "have assumed a vital role in assembling and evaluating consumer credit and other information on consumers." 15 U.S.C. § 1681(a)(1), (3).

Associated Credit Bureaus, Inc. ("ACB"), is a non-profit trade association which represents the interests of the consumer credit reporting industry. ACB's members include almost 400 national, regional, and local credit bureaus located throughout the United States and Puerto Rico. ACB's members collect and maintain information on the credit histories of more than 190 million Americans. From this information, ACB's members compile roughly 900 million consumer credit reports annually, which are used by their customers for purposes that include determining consumers' eligibility for consumer credit, insurance, and other permissible purposes.

Trans Union LLC ("Trans Union"), Equifax Credit Information Services, Inc. ("Equifax"), and Experian Information Solutions, Inc. ("Experian"), which are members of ACB, are the largest consumer credit reporting agencies in

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[1] Counsel for Petitioner, Daniel H. Bromberg, Esq., of Jones, Day, Reavis & Pogue, and counsel for Respondent, Andrew Henderson, Esq., of Hall & Henderson, LLP, have given their consent to *Amici* to file this brief. Letters documenting this consent are filed concurrently with this brief. Counsel for the *Amici* were the sole authors of this brief. No person or entity other than *Amici* made a financial contribution to this brief.

the United States. The three major nationwide credit bureaus each maintain computerized databases containing credit information relating to over 180 million American consumers. These databases are continually updated with information obtained from more than 85,000 sources, including banks, mortgage companies, utilities, and public records. Credit reports include identifying information, detailed payment history and other account information, bankruptcy filings, tax liens and other public record information, and the identity of entities receiving the consumer's credit report.

The three *Amici* consumer reporting agencies maintain files on residents of all fifty States, and employ procedures which apply across their national operations. Even those consumer reporting agencies which do not maintain nationwide files operate on a national level. Unlike the national economy of only thirty years ago, consumers today obtain credit from not only local merchants, but credit card companies, retailers and other credit grantors across the nation. For example, a local consumer reporting agency maintaining files only on residents of Georgia nonetheless may disclose consumer credit information to customers throughout the United States who receive credit applications from Georgia residents.

Amici jointly submit this brief in support of the Petition for Writ of Certiorari because of the importance of the case to the credit reporting industry, and because an understanding of the credit reporting industry is helpful to understanding the significance of the case. *Amici* have a strong interest in the question raised in this case regarding the statute of limitations period governing claims brought under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq*. The consumer credit reporting activities of ACB members, including Trans Union, Experian, and Equifax, are extensively regulated

by the FCRA. In addition, Trans Union was a defendant in the proceedings while the action was pending before the district court, and Experian is the successor to the consumer credit reporting operations of Petitioner TRW Inc. Further, in reliance upon the two-year limitations period under the FCRA, *Amici* have established retention policies for computerized data and documents created in connection with fulfilling their consumer disclosure and dispute investigation duties of the FCRA.

SUMMARY

Amici urge the Court to grant the TRW Inc. Petition for Writ of Certiorari. The case is of great significance to the credit reporting industry because the decision below imposes additional document retention burdens on the credit reporting industry that were not intended by the FCRA, and because it will needlessly encourage the filing of FCRA claims that are barred by the statute of limitations.

REASONS FOR GRANTING THE WRIT

I. The Fair Credit Reporting Act Creates Substantial Record-Keeping Requirements for Credit Reporting Agencies.

A. The FCRA Imposes Significant Consumer Disclosure, Investigation and Notice Obligations.

1. The FCRA extensively regulates the maintenance and disclosure of information by credit reporting agencies, described as "consumer reporting agencies" under the statute. 15 U.S.C. § 1681a(f). Section 607(b) of the Act mandates that, in compiling a credit report, or "consumer report," consumer

reporting agencies must follow "reasonable procedures" to assure "maximum possible accuracy" of the information contained in the report. 15 U.S.C. § 1681e(b). In turn, consumer reports created by consumer reporting agencies may be distributed only to those with a statutorily-defined "permissible purpose" to receive the report, *e.g*, to determine a consumer's eligibility for credit, insurance, or employment. 15 U.S.C. § 1681b(a).

2. The FCRA imposes on consumer reporting agencies the obligation to disclose to consumers information that is maintained regarding them, to investigate consumer disputes regarding such information, and to promptly notify consumers of the results of such investigation.

Section 609(a) of the FCRA requires consumer reporting agencies, at the request of a consumer, to disclose: "[a]ll information in the consumer's file at the time of the request"; all sources of that information; and the identity (name, address and phone number) of each person that procured a consumer report regarding the consumer in the prior year (or prior two years, for reports obtained for employment purposes). 15 U.S.C. § 1681g(a). Such disclosures must include written notice of all rights provided to consumers under the FCRA and, "in the case of a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis,"a toll-free telephone number at which consumers may contact agency personnel. 15 U.S.C. § 1681g(c). The conditions and form of disclosures to consumers are further prescribed by Section 610 of the FCRA, 15 U.S.C. § 1681h.

Consumers can obtain a copy of their consumer report free of charge if the consumer is unemployed or a recipient of public welfare assistance, or if the consumer has reason to believe that

the information maintained is inaccurate due to fraud (*e.g.*, identity theft). 15 U.S.C. § 1681j(c). A consumer who has been denied credit, or is the subject of any other similar adverse action based in part on information contained in consumer reports, may also obtain a consumer report free of charge. 15 U.S.C. § 1681j(b). In addition, any credit grantor or other person who takes any adverse action must provide the consumer with the name, address, and toll-free telephone number of the consumer reporting agency which prepared the report, and must also notify the consumer of her right to a free consumer report and to dispute any information maintained by the agency. 15 U.S.C. § 1681m(a).

The FCRA also requires consumer reporting agencies to process and timely investigate consumer disputes regarding the information they maintain. If a consumer disputes the "completeness or accuracy of any item of information contained in a consumer's file," the consumer reporting agency must reinvestigate free of charge and record the current status of the information or delete it from the file within thirty days of receiving the dispute. 15 U.S.C. § 1681i(a)(1)(A). Within five days of receiving a consumer dispute, the consumer reporting agency must provide the furnisher of the disputed information with "all relevant information regarding the dispute." 15 U.S.C. § 1681i(a)(2). Data furnishers receiving such disputes from consumer reporting agencies must conduct an investigation and report the results to the consumer reporting agency. 15 U.S.C. § 1681s-2(b)(1). If the disputed information is incomplete or inaccurate the data furnisher must also notify all national consumer reporting agencies. 15 U.S.C. § 1681s-2(b)(1)(D).[2]

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[2] Consumer reporting agencies operating on a national basis must implement "an automated system" to facilitate the investigation procedures

(continued...)

Consumer reporting agencies must provide written notice to consumers if the dispute is determined irrelevant. 15 U.S.C. § 1681i(a)(3)(B). The agencies must also notify the consumer of the results of the investigation within five (5) days of completing the investigation. 15 U.S.C. § 1681i(a)(6). Consumer reporting agencies must provide consumers with notice of their right to add a statement to the consumer's file disputing its accuracy or completeness. 15 U.S.C. § 1681i(a)(6)(B)(iv). At the request of the consumer, a consumer reporting agency must also notify those receiving the consumer's credit report in the last six to twenty-four months of the consumer's dispute statement, or that inaccurate information was deleted. 15 U.S.C. § 1681i(d). If information which was once disputed and deleted is later reinserted into a consumer's file, the consumer reporting agency must so notify the consumer. 15 U.S.C. § 1681i(a)(5)(B).

3. The FCRA also provides consumers with a cause of action against consumer reporting agencies which negligently or willfully violate any provision of the FCRA. 15 U.S.C. §§ 1681n, 1681o. Section 616 provides consumers with the right to compensatory or statutory damages and punitive damages if a consumer reporting agency willfully violates the Act. 15 U.S.C. § 1681n. Section 617 provides for the recovery of actual damages by consumers who have been harmed by a negligent failure to comply with the FCRA. 15 U.S.C. § 1681o.

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[2] (...continued)
of consumer reporting agencies and data furnishers. 15 U.S.C. § 1681i(a)(5)(D). *Amicus* ACB operates the required automated system for the three *Amici* nationwide consumer reporting agencies.

B. Compliance With the FCRA Consumer Relations Requirements Creates Large Amounts of Computerized and Paper Files.

Compliance by consumer reporting agencies with the disclosure, investigation and notice obligations of the FCRA creates large amounts of computerized and paper files. The three *Amici* consumer reporting agencies, for example, currently maintain tens of thousands of cubic feet of historical paper files and thousands of computerized cartridges containing archived data.

The *Amici* consumer reporting agencies each separately maintain computerized systems to process consumer disputes and requests for file disclosures, and to create a record of the disclosure and internal investigation procedures in individual instances. Communications between consumers and the agency, either by phone or in writing, corrections or other maintenance in connection with the consumers' disputes, and contacts with data furnishers regarding the disputes are maintained on the systems. Separately, the consumer reporting agencies receive and create a variety of paper documents in connection with consumer requests and disputes, and the responses to such inquiries.

The types and quantity of information maintained by consumer reporting agencies is illustrated by the files of Trans Union reflecting the dispute filed by Respondent Adelaide Andrews.[3] Respondent sued Trans Union in the proceedings below, but later settled with Trans Union. Trans Union's files produced in the district court proceedings included:

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[3] Trans Union possessed the historical paper and computer files because they were created less than two years before Respondent filed her action.

- computerized and written records of Respondent's multiple phone conversations with Trans Union employees;

- correspondence (and lengthy attachments) between Trans Union and Respondent regarding her requests;

- various forms completed by Trans Union and/or Respondent in processing the consumer's requests;

- copies of Trans Union file disclosures provided to Respondent; and

- correspondence between Trans Union and the data furnisher whose information was the subject of Respondent's dispute.

These documents were relevant to Respondent's FCRA claims that Trans Union failed to use reasonable procedures to assure maximum possible accuracy of information regarding Respondent, and that Trans Union failed reasonably to investigate her dispute. *See* App. 11a, 18a-19a.

The *Amici* consumer reporting agencies have established document retention policies with respect to consumer relations activities which are keyed to the two-year limitations period established by the FCRA, 15 U.S.C. § 1681p. These retention policies, like those of many other consumer reporting agencies, are consistent with the informal guidelines of the Federal Trade Commission, the federal agency with enforcement authority under the FCRA. *See, e.g.*, Federal Trade Commission Fair Credit Reporting Act Staff Opinion Letter to Stephen Kilgo, July 28, 1998, at 1 *available at* http://

www.ftc.gov/os/statute/fcra/kilgo.htm (visited January 19, 2001) (recommending that documents concerning compliance with the Act be retained for at least the two-year limitations).[4]

II. The Decision Below Will Impose Significant Additional Burdens on Credit Reporting Agencies.

A. The Ninth Circuit Ruling Will Impose Additional Document Retention Burdens on Consumer Reporting Agencies.

Prior to the recent ruling by the Ninth Circuit, each of the four federal appellate courts which considered the issue have interpreted the FCRA consistent with legislative intent and rejected incorporating an implied discovery rule into Section 618. As explained by the Petition (Pet. 8-11), however, the Ninth Circuit has issued a contrary ruling, thereby creating a four-to-one split among the federal courts of appeals regarding application of the general discovery rule to the FCRA statute of limitations. As a result, the two-year limitations period for FCRA claims, which governs consumer reporting agencies' document retention policies, is no longer certain.

If the circuit split is not resolved by the Court, the Ninth Circuit decision will have a serious impact on the document retention policies of consumer reporting agencies relating to their consumer relations operations. Consumer reporting

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[4] The *Amici's* document retention policies are also consistent with the plain language of the FCRA. The statute requires consumer reporting agencies to disclose to consumers the identity of those persons receiving their credit reports within the prior one to two years. 15 U.S.C. § 1681g(a)(3)(A). Therefore, consumer reporting agencies have no obligation to maintain such information for more than the two-year limitations period.

agencies receive millions of consumer requests for file disclosures and investigate millions of consumer disputes each year. These consumer relations activities create large amounts of computerized data and documents which may be necessary to defend against actions brought under the FCRA. The Court has previously noted the "serious administrative problems" associated with implying equitable tolling exceptions into federal statutes which govern large operations impacting millions of individuals. *See United States v. Brockamp*, 519 U.S. 347, 352-53 (1997)(refusing to read equitable tolling exception into federal statute governing IRS processing of 200 million tax returns and 90 million refunds each year, noting the attendant "serious administrative problems" of forcing the IRS to litigate stale claims).

B. The Ninth Circuit Ruling Will Encourage The Filing Of Otherwise Time-Barred Cases, And Create Uncertainty As To What Actions Are Barred.

Consumer claims against consumer reporting agencies brought under the FCRA are federal questions, permitting such suits to be brought in the federal courts, regardless of the amount in controversy. *See* 28 U.S.C. § 1331. Such lawsuits often involve relatively small monetary awards. However, the FCRA provides for an award of attorneys fees to claimants prevailing on willful and even negligent violations of the FCRA, 15 U.S.C. § 1681n(a)(3), § 1681o(a)(2), thereby eliminating any disincentive for such small claims. Due in part to the public's increasing awareness and concern regarding privacy issues, the number of FCRA suits filed in the federal courts is increasing. *See* Pet. 15 n.4. The decision of the Ninth Circuit will likely encourage the filing of lawsuits which would otherwise be clearly barred by the FCRA statute of limitations,

as interpreted by the Third, Seventh, Tenth, and Eleventh Circuits. As noted by the Petition (Pet. 15 n.5), questions concerning whether the discovery rule will permit suits based upon conduct outside of the FCRA's two-year limitations period are frequently raised. The four-to-one split among the federal courts of appeal creates uncertainty as to the law to be applied by district courts in determining whether an FCRA suit is time-barred, thereby increasing the litigation of the issue.

III. The Decision Below Was Wrongly Decided.

Congress expressly provided for a two-year statute of limitations period under the FCRA, except "where a defendant has materially and wilfully misrepresented any information required under [the FCRA] to be disclosed to an individual." 15 U.S.C. § 1681p. This sole exception was not part of the original version of the FCRA passed by the Senate, which was later amended to include the fraud exception. *See* S. 823, 91st Cong. § 618 (1969); 116 Cong. Rec. 35940 (Oct. 9, 1970) (statement of Sen. Proxmire); H.R. Conf. Rep. 91-1587, *reprinted in* 1970 U.S.C.C.A.N. 4411, 4416. The Ninth Circuit's interpretation of the statute renders the exception language of Section 1681p "mere surplusage." *See Dunn v. Commodity Futures Trading Com'n*, 519 U.S. 465, 472 (1997). If Congress intended, in enacting the FCRA, to incorporate the implied general discovery rule into the FCRA statute of limitations, there would be no need to create the narrow fraud exception. For example, if a defendant "materially and wilfully misrepresented any information" to a plaintiff, the plaintiff clearly did not know or should not have known of her claim. Therefore, the only proper interpretation of the FCRA statute of limitations and the legislative intent behind it is that the discovery rule does not apply.

CONCLUSION

For the foregoing reasons, *Amici* Associated Credit Bureaus, Inc., Trans Union LLC, Equifax Credit Information Services, Inc., and Experian Information Solutions, Inc. respectfully request that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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